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Second District Appellate Court reaffirms ground rules on SSA objection petitions

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In a recent decision, *Peeples v. Village of Johnsburg*[1] the Appellate Court for the Second District reiterated the rules to be followed when objectors to a special service area ("SSA") file an objection petition.

1. Introduction and background

By way of background, the Village of Johnsburg in McHenry County, Illinois sought to establish an SSA in order to create a financing vehicle for a waste water system and facility to combat waste leaching from septic fields that was contributing to the deterioration of the Fox River.[2] The Village approved an ordinance proposing an SSA, published notice for the required public hearing and conducted such hearing. An objection petition was subsequently filed within the 60 day deadline set forth in Section 27-55 of the SSA Law, 35 ILCS 200/27-55.

Section 27-55 provides in part as follows:

> Objection Petition. If a petition signed by at least 51 percent of the electors residing within the special service area and by at least 51 percent of the owners of record of the land included within the boundaries of the special service area is filed with the municipal clerk… within 60 days following the final adjournment of the public hearing, objecting to the creation of the special service district, … the district … shall not be created…

"Owners of record" are defined by this section as those persons "in whose name legal title to land within the boundaries of the special service area is held according to the records of the county in which the land is located." "Electors" are defined as all "resident[s] of the special service area registered to vote."

The relevant time for determining both of these qualifications is "the time of the public hearing held with regard to the special service area."[3]

The Village Clerk was asked to research the objection petition and relied upon the County Treasurer's records for ownership information and the County Clerk's registered voters list relative to electors.[4] The Clerk subsequently reported to the Village Board of Trustees that less than 51 percent of the owners of record and electors signed the objection petition.[5] A written but unsigned "response" to such finding was submitted to several Village officials in private meetings requested by objectors that was later admitted to be erroneous. Such response listed one person as being deceased when she was very much alive and going to church regularly. Weeks later, in the absence of any hearing requested by the objectors or any evidence challenging the Village Clerk's research being presented by the objectors, the Village adopted an ordinance establishing the SSA with a finding consistent with the Village Clerk's research and findings.

A handful of objectors brought suit asking for a declaratory judgment that a majority of electors and owners signed the objection petition and that the SSA ordinance be held null and void. The trial court, after a bench trial which extended over three months, declared the SSA ordinance to be null and void.[6] The Appellate Court for the Second District, after granting the Village's motion to expedite the matter, quickly reversed the trial court on a number of grounds.

2. The "level playing field" rule

At trial, the trial court permitted the objectors to introduce recorded deeds in an effort to demonstrate that the County Treasurer's records, which incorporated information from both the Assessor's and Recorder's office each year, were outdated and/or incorrect as of the specific public hearing date.[7] None of the deeds introduced by the objectors, however, were ever presented to the Village Board of Trustees for consideration prior to its vote on the ordinance establishing the SSA. Nonetheless, at the bench trial, when the Village in turn sought to introduce deeds of record to reinforce the accuracy of the Village Clerk's research and the Village Board's finding, the trial court, while initially admitting same, subsequently reversed itself and ruled that such deeds could not be entered into evidence in light of the deeds not being before the Village Board at the time of the vote. The trial court determined that the deeds sought to be entered into evidence by the Village were "irrelevant" on the basis that the deeds had not been physically before the Board when it voted.[8] In addressing the trial court's evidentiary ruling, the appellate court pointed out that a trial court abuses its discretion when its ruling is arbitrary, unreasonable, or simply when no reasonable person would take the view adopted by the trial court. *People v. Anderson*[9] or where its ruling rests on an error of law. *Cable America, Inc. v. Pace Electronics, Inc.*[10] That standard was satisfied here. The appellate court wrote that:

> The fact that evidence was not relied on by the Village in deciding to adopt Ordinance Number 07-08-11 cannot be used to bar the admission of the Village's evidence where that fact was not used to bar the admission of similar evidence proffered by the plaintiffs.[11]

Accordingly, the appellate court determined that trial court's double standard regarding evidence was indeed an "abuse of discretion."[12]

The appellate court's ruling avoids two troublesome scenarios raised by the trial court decision as follows. First, that unless the board members review every deed or voter registration card for all the owners and electors within a given SSA, no such evidence can be introduced at a later time in the trial court; second, that a village board member must seemingly take several weeks to analyze the deeds for several hundred parcels and registration cards for hundreds of voters if the municipality wishes to be in a position to be able to vote on the ordinance. In the second scenario, board members cannot rely on a staff report or analysis—even if it goes unchallenged and no evidence is submitted which challenges it. Both of these are disposed of by the appellate court decision.

3. The county clerk's registered voter list can be relied on by municipality to ascertain electors within an SSA

Another basis for reversal of the trial court's decision was the Village's reliance on the official list of registered voters. Ninety percent of the bench trial was devoted to listening to witnesses who objected to the SSA and claimed that people at the listed addresses in the voter registration records had moved.[13] The testimony tended to involve knowledge of intimate family matters, such as, by way of example, spouses who moved out of the home, a son battling drug dependency and leading a transient lifestyle, etc. Other testimony regarding residency issues by the objectors was simply confusing. For example, one witness testified that a person residing at the person's home, as reflected on the registered voter list, was residing at that location on the day of the public hearing, yet concluded that the person in question was for some unarticulated reason not a resident within the SSA. Other witnesses called by the objectors testified that they did not believe that a person was a resident despite the person in question having an Illinois driver's license, the person's living at the given address several months a year and the fact that individual received mail at that address on the voter records. Nonetheless, the trial court determined that, as a result of such testimony, a majority of electors within the SSA signed the objection petition.

The appellate court determined that the Village's reliance on the voter list as the official list of voters and their residential address was in accordance with existing Illinois case law. As previously explained by the Second District in *Hatcher v. Anders*[14] "once a residence has been established, it is presumed to continue until the contrary is shown, and the burden of proof is on the person who claims that there has been a change." It elaborated as follows: "[a]ffirmative acts must be proved to sustain the abandonment of an Illinois residence and a temporary absence from the state, no matter how protracted, does not equate with abandonment."[15] The Court went on to add; "[o]nly when abandonment has been proven is residence lost."[16]

While not cited by the appellate court in *Peeples*, the problem with disregarding the voter list is the factual analysis necessarily involved with the question of residency, which is addressed in *U.S. v. Scott*.[17] The 7th Circuit Court provided that where a person resides, whether he owns a home or pays rent, and where his family and personal belongings are located are all factors that must be evaluated in determining his intent to remain indefinitely for purposes of establishing domicile. Also, considerations such as where he exercises his political rights, where he maintains affiliations with religious and social organizations, where he transacts business and financial matters, where he pays personal taxes, and where he obtained a driver's license are relevant as well.[18]

The appellate court in *Peeples* ruled that the trial court's admitting and considering this self-serving testimony in the *Peeples* bench trial was error "as a matter of law."[19] The appellate court pointed out that while section 27-55 contains no further definition of "electors" or "registered voters," the General Assembly decided that the meaning of these terms as used in any statute would be supplied by section 3-1.2 of the Election Code, which states in part:

> For the purpose of determining eligibility to sign….a petition proposing a public question the terms "voter," "registered voter"… [and] "elector" as used in this Code or in another Statute shall mean a person who is registered to vote at the address shown opposite his signature on the petition.[20]

Thus, by statute, the total number of electors in a designated area such as an SSA is the same as total number of persons registered to vote at addresses in that area (whenever this code or another statute requires that a petition proposing a public question shall sign by a specific percentage of registered voters of a district the total number of voters which the percentage is applied shall be the number of voters who are registered in the district). In turn, the appellate court determined that the Village and the Village Clerk properly relied upon the County Clerk's registered voters in compiling the total number of electors.[21] The Second District's decision was consistent with that of the First District contained in *Shapiro v. Regional Board of Trustees*.[22] *Shapiro* involved a fact situation where plaintiffs sought to detach a certain area from a school district.[23] As part of their efforts, plaintiffs had attempted to decrease the number of total number of registered voters by conducting a door-to-door survey in the relevant area asking each home who resided there, who was the registered voter and striking the names of people who the survey takers were told had moved or died.[24] The *Shapiro* court firmly rejected this approach to reduce the number of registered voters, not only based on the grounds that the information gathered was hearsay but also because the county clerk's list of registered voters provided proof of residency that the court was bound to accept. It explained that:

> The problem here is that plaintiffs attempt to read 'registered voter' and 'residing in the detachment area' as two separate and unrelated tests. They then argue that they are only concerned with the latter prong of the test, and assert that the Election Code is inapplicable thereto. * * * [P]laintiffs sought to remove names from the official register under the guise of determining who 'resided in' the detachment area. However, that official register tells them who resides in the area, because residency is one of the requirements of registration. If Plaintiffs wish to challenge that official reg-

istry, they must do so in the manner provided by statute, i.e., section 4-12 of the Election Code [(Ill.Rev.Stat. 1979, ch. 46, par. 4 – 10 (now see 10 ILCS 5/4 – 12 (West 2006)].[25]

The appellate court made two observations in the *Peeples* decision: i) that the objectors in the litigation did not apply to the County Clerk to remove from the list of registered voters those persons who they believed moved out of the SSA; and ii) and the County Clerk did not remove any names from the registered voters list between the public hearing and the Village's adoption of the SSA ordinance even as a result of a requested "purge" of County voter records by the objectors. As a result, the appellate court determined that the objectors fell short of the 51 percent threshold with respect to electors.

4. If there is land, there is an owner

One of the more curious rulings by the trial court involved three parcels for which the trial court determined that there was no owner of record despite their being within a platted subdivision. There were property identification numbers for these parcels assigned to them by the County, which were in a recorded plat of subdivision.[26] Part of the trial court's confusion may have been the fact there was no subsequent deed for the parcels in question once the plat was recorded, i.e., the original subdivider did not subsequently "deed out" certain parcels. However, the records relied upon by the Village did reflect the owner of record as being the original subdivider. The appellate court ruled that, in this instance, where there is no deed for land in a platted subdivision, the original subdivider is the "owner of record."[27] Rather than the land and the parcels in question not having an owner of record, the trial court erred in its determination that there were no owners of record.[28]

5. Co-owners are owners too

The trial court had subtracted seventeen owners from the total number that the Village calculated as being within the SSA on the purported basis that the Village had improperly counted the properties as having more than one owner.[29] The properties in question were owned by two or more corporations or living trusts. Section 27-55 provides that land owned in the name of a land trust, corporation, estate or partnership shall be considered to have a single owner of record.[30]

In this instance, the trial court divined an intent on the part of the legislature that property owned by two or more entities or trusts, other than individuals, could not be counted as having more than one owner regardless of how many co-owners there were.[31] However, if two or more individuals were owners of record, each individual was counted as owner by the trial court. The Village readily agreed that only one owner should be counted for properties owned by a single land trust or corporation. As to living trusts, however, the Village maintained that where there was more than one living trust of record which owned the property, each co-owner trust should be counted as an owner of record. The appellate court said that, contrary to the trial court's holding, nothing within the plain language in section 27-55 would suggest a legislative intent to disqualify multiple owners of the same land from being counted as owners of records merely because there are not individuals. The appellate court maintained the fundamental principle that the language of a statute is the most reliable indictor of a legislator's objectives in enacting it. *Yang v. City of Chicago*.[32] Section 27-55 states in part that:

> Land owned in the name of *a* land trust, corporation or partnership shall be considered to have a single owner of record. (emphasis added by the court).

This language prevents a single institutional owner from being counted as if it were more than one owner as might happen if one partnership were counted as if all the partners were owners of record.[33] However, the statute does not state that land owned by more than one land trust or corporation must be treated as having only one owner of record.[34] Thus, the statute does not require that where more than one living trust owns the property in question, the property nonetheless must be counted as having only one owner.

Lending further reinforcement to its decision, the appellate court ruled that even if the statute did prevent some institutional owners from being counted as owners of record, living trusts are not within the numerated institutional property owners to which this section applies.[35] Accordingly, there is no statutory mandate requiring that if more than one living trust owns a property, the property must be treated as having only one owner. Ordinarily, all co-owners are counted as owners of record for that property. See, *In Re Petition to Annex Certain Real Estate to the City of Joliet*.[36] In that case, the Supreme Court rejected the argument that co-owners of property should be counted as if they were one owner and reaffirmed earlier precedent that co-owners of property should be considered owners of record. Although the *Joliet* decision involved individuals, the appellate court in *Peeples* maintained that it could not "see any reason to treat trusts owning property differently from individual owners in this context." The appellate court determined that, as a result, owners should be added back to the total number within the SSA that the trial court had removed.[37]

6. Beneficiaries of trusts are still not owners of record

Another issue arose when a resident signed her individual name as being the owner of record for a parcel when in fact it was deeded to a trust and for which she explained that she was not a trustee. The trial court determined that her signature counted as an owner of record without even citing any authority, the appellate court simply determined that a beneficiary's signature on behalf of the trust is invalid as being that of an owner of record. See, e.g., *Madigan v. Buehr*,[38] (beneficiary of a trust is not the owner). This was still another ground for the trial court to be reversed.

7. Issues not addressed by the court because the objection petition was invalid on other grounds

a) Review of a board decision utilizing evidence never presented to such board.

Because there were a number of other grounds to reverse the trial court, the appellate court declined to address two issues insofar as they were not needed to be dispositive of the case. First, in light of the Village Board's actions acting in a quasi judicial matter to determine whether a majority of electors and/or owners signed the objection petition, should the standard of review have been an administrative one, by which the trial court simply looks to the body or record of evidence before the Board at the time of its decision, or de novo, where both sides present evidence as if no decision by the Board had been made? The appellate court ruled that there had been previous SSA challenges

in the courts which, while they relied on the declaratory judgment actions as the vehicle to challenge same, there had not been any comment as to whether it was appropriate or inappropriate to do so. A future court may decide this on public policy grounds and fairness. That is, should objectors be allowed to sit on their hands, not provide any evidence in support of the objection petition prior to a village board's determination as to whether it is valid, and then be allowed to introduce evidence at a later time in court? The question of whether an administrative standard or de novo standard also ties into the issue of fairness of a trial court analyzing the actions and the rational of a village board when the trial court may have access to evidence by objectors that was never presented to the village board in the first place.

These issues were first raised during a preliminary injunction hearing requested by the objectors. The applicable standard was whether they raised a "fair question" as to whether they would prevail on the merits. There were three days of testimony at the hearing at which the objectors testified regarding residency and owners of record but such evidence was never presented to the board of trustees. At the conclusion of the preliminary injunction hearing, the trial court did not enter such injunction ostensibly because the standard of the objectors raising a fair question as to the validity of the SSA ordinance had not been satisfied. The matter was subsequently scheduled for trial. If a trial court, after days of testimony and evidence by the objectors determined that fair question has not been achieved as to whether the objection petition had met the 51 percent threshold, why would a village board's decision, several months earlier and without the purported benefit of such testimony, be deemed to be arbitrary or capricious so as to nullify an SSA ordinance?

b) Whether individual signatures on "behalf of" trusts are those of the owners of record

Another issue that was left unaddressed by the appellate court was whether an individual's signature, which makes no reference to the title holding trust of a given parcel, constitutes a signature of the owner of record. For example, say an individual named Joe Johnson signs his name on the owner of record objection petition when in fact the deed of record reflects that the owner of record is, in fact, the ABC Trust with Abigail Johnson as trustee. In these instances, objectors appeared at the trial explaining that there were, in fact, one or more trustees that may not have signed the objection petition or that a trustee had been replaced and was not reflected on the face of the deed.

8. Conclusion

The analysis in the *Peeples* decision, utilized at the trial court level, would have likely led to the dismissal of the objectors' case after a few weeks' time.

Nonetheless, despite the two issues described above not being answered, the appellate court's decision is a valuable one to municipalities. It brings a measure of certainty to the SSA objection process, which is particularly important where residents are depending upon the issuance of bonds to finance the special services sought by them. It also reinforced the precedent established by the Supreme Court and other Appellate Districts in their analyses of "owners of record" and "electors." ■

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1. 2010 WL 2780770 (2nd Dist. 2010)
2. Id
3. Id.
4. *Peeples* at 2
5. Id.
6. *Peeples* at 2
7. *Peeples* at 5
8. Id.
9. 367 Ill.App.3d 653, 654, 856 N.E.2d 29 (2006)
10. 396 Ill.App.3d 15, 24, 919 N.E.2d 383 (2009)
11. *Peeples* at 5.
12. Id
13. *Peeples* at 6.
14. 117 Ill.App.3d 236, 239, 453 N.E.2d 74, 77 (2nd Dist., 1983)
15. Id.
16. Id.
17. 472 F. Supp. 1073, 1079 (N.D.Ill 1979), affirmed, 618 F.2d 109 (7th Cir. 1980), certiorari denied, 100 S.Ct. 1650, 455 U.S. 962, 64 L.E.2d 238 (1980).
18. Id.
19. *Peeples* at 7
20. 10 ILCS 5/3-1.2
21. *Peeples* at 7
22. 116 Ill.App.3d 397, 451 N.E.2d 1282 (1st Dist. 1983)
23. Id. at 1284
24. Id. at 400, 451 N.E.2d 1285.
25. Id. at 407, 451 N.E.2d 1289
26. *Peeples* at 10
27. Id.
28. Id.
29. Id. at 17
30. 35 ILCS 200/27-55
31. Id. at 10
32. 195 Ill.2d 96, 103, 745 N.E.2d 541 (2001)
33. Id. at 10
34. Id.
35. 35 ILCS 200/27-55
36. 144 Ill.2d 284, 291, 579 N.E.2d 848 (1991)
37. *Peeples* at 11
38. 125 Ill.App.2d 8, 260 N.E.2d 431 (1st Dist., 1970)